

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER

In Re: Residency of Student C. Doe

DECISION

Held: Student Doe continues to be a resident of Westerly for school purposes because he lives in New York City only for purposes of attending an out of district placement at a private day school in which his parents enrolled him after a disagreement with Westerly as to whether the district was providing him with a free appropriate public education. A due process hearing officer will determine whether the parents were justified in making this unilateral placement and whether they are entitled to reimbursement for tuition, and other expenses, associated with his enrollment there.

DATE: August 25, 2010

Travel of the Case

On February 19, 2010 Student Doe's parents filed a request for an Impartial Due Process Hearing with the Rhode Island Department of Elementary and Secondary Education. Their specific complaint alleged, inter alia, that the Westerly School Department had failed to provide their son, a student with a disability, with appropriate educational services and a placement that met his needs. They also alleged that despite the provision of special education and related services to their child from preschool age to age eleven (11), he had made very little progress in many important areas of his education. Counsel for the Westerly School Department filed a Motion to Dismiss the proceedings before the due process hearing officer on May 10, 2010 and simultaneously filed a request for a residency determination under R.I.G.L. 16-64-6 with Commissioner Deborah A. Gist.

The matter was assigned to the undersigned for hearing and decision on May 13, 2010. The hearing officer acknowledged receipt of the request for determination of residency and a tentative hearing date was secured. In the meantime, on May 17, 2010 the due process hearing officer issued a decision denying the Motion to Dismiss, finding that Student Doe remained a resident of Westerly because he was living out of the district solely to attend the school in which he was placed by his parents. The decision of the due process hearing officer determined that Student Doe's residency was a "FAPE issue" inasmuch as federal and state regulations (ensuring students with disabilities receive a free appropriate public education) were "paramount in this matter."¹ On May 21, 2010 counsel for Student Doe's parents filed an Objection to the School Department's Hearing Request based on facts contained in Affidavits of both parents and other documentation, including the May 17, 2010 Ruling of the due process hearing officer. Counsel submitted in a Memorandum supporting the Objection dated May 21, 2010 that Student Doe "remains, in any event, a resident of Westerly, Rhode Island, unless and until such time, if ever, that the Westerly School Department can prove, in a hearing pursuant to R.I.G.L. 16-64-6, that he is no longer a resident of Westerly."

On July 19, 2010 a hearing pursuant to R.I.G.L. 16-64-6² was conducted by the undersigned at which time testimony and documentary evidence were submitted by the parties. Legal arguments were then made in written memoranda received by the hearing officer on July 29, 2010 at which time the record in this case closed.

ISSUE

Is Student Doe a resident of Westerly for school purposes?

Findings of Relevant Facts:

- Student Doe, a child with disabilities, attended Westerly Public Schools from the time he was in preschool, when he was first found eligible for special education services through fifth grade. Tr. pp. 32-34.

¹ The full text of the due process hearing officer's ruling was made a part of the record as Respondent's Ex. E.

² Under which statute jurisdiction to determine residency disputes rests with the Commissioner or the Commissioner's designee.

- During all of these years, he lived full-time with his parents at the family home in Westerly. Mr. and Mrs. Doe have lived at their current home in Westerly since January of 1984. Tr. p. 30.
- During the 2007-2008 school year when Student Doe was in fifth grade, his parents became increasingly concerned with respect to his failure to make academic progress, and the impact his academic difficulties were having on his ability to focus, be organized, and maintain behavioral and emotional control. They also were alarmed that, by the end of the school year, the district had not developed an IEP that addressed sixth grade and Student Doe's anticipated attendance, placement and services at the middle school. Tr. p. 37; Respondents Ex. A and C.
- As a result, Student Doe's parents investigated possible alternative school placements, both within and outside Rhode Island. They were unable to locate a day school program that was appropriate for Student Doe, that was within commuting distance of their home in Westerly and that would accept him. Tr. pp. 37-38. Since Student Doe was only eleven (11) years old and extremely immature, his parents did not consider a residential placement appropriate for him. Tr. pp. 38-39.
- Student Doe's parents did locate a specialized, out-of-district day school that appeared appropriate for their son that was located within commuting distance of a condominium apartment in New York City that Student Doe's father has owned since the late 1970's. Tr. pp. 34, 39, and 60; Respondents Ex. C.
- Upon Student Doe's acceptance at this out-of-district day school, which is located in Brooklyn, New York, Student Doe's parents gave the Director of Special Education in Westerly notice on August 1, 2008 of their intent to enroll him and unilaterally enrolled him there on September 9, 2008. Tr. pp. 34-36; Respondents Ex. A and B.
- Student Doe has remained enrolled in this specialized out-of-district day school since September of 2008. He and his mother live in the small studio apartment in New York City during the school year (September to June) and return to the family's home in Westerly on school vacations, most long weekends, some two-day weekends and for the summer.³ Tr. pp. 42-43. Student Doe's father lives at the family home in Westerly, except for travel associated with the businesses that he operates from an office also located in Westerly. Tr. pp. 53-55.
- The decision that Student Doe and his mother would live in a studio apartment in New York City during the majority of the days of the school year was a joint decision made by his parents so that he could attend a specialized day school that they feel provides him with the education he needs. There is no other reason that the family does not live together in the family home in Westerly. Tr. pp. 39-40, 49-50 60-61.

³ Student Doe attends a special camp for children with disabilities for one week during the summer and his entire family has attended a week-long convention for people who share one of his disabilities for the past four or five summers. Tr. pp. 44-45. They are otherwise in Westerly for the entire summer.

- On February 19, 2010 Student Doe's parents filed a request for an impartial due process hearing with the Rhode Island Department of Elementary and Secondary Education, seeking reimbursement for the costs associated with his enrollment in the private day school in New York City. Tr. pp. 45-46; Respondents Ex. C.
- On May 10, 2010 the Westerly School Department filed A Motion to Dismiss the parents' request for a hearing. Respondents Ex. D.
- On May 17, 2010, the due process hearing officer denied the School Department's Motion to Dismiss, ruling that the issue was not a "residency issue" but rather a FAPE issue since Student Doe was living out of the district solely to attend the school in which he was placed by his parents because of their dispute with the district regarding an appropriate program for him. Respondents Ex. E.⁴

Positions of the Parties:

Westerly School Department:

Counsel for the School Department points to the basic fact that this student actually lives in New York City during the school year and therefore is a resident of New York City for school purposes. The argument of the district is that Student Doe's parents established his new residence in New York City when they withdrew him from Westerly schools in the fall of 2008 and enrolled him in the private day school he has since attended. It matters not that his father continues to reside in Westerly, or that the parents are registered voters and pay taxes to the town, because Student Doe's school residency is determined by where he actually resides. During the school year, he resides for the most part in New York City and his residency for school purposes stems from his physical presence there during the school year.

Furthermore, under Rhode Island education law, specifically R.I.G.L. 16-64-1, when a child's parents reside, as they undisputedly do in this case, in different cities, the child is "deemed to be a resident of the city or town in which the parent having actual custody of the child resides." Student Doe's parents concede that they have made a decision to live under separate roofs during the school year. It is his mother who has "actual custody" of Student Doe every day of the school year during which time he commutes daily to school in Brooklyn from the studio apartment in Manhattan.

Student Doe's parents take the position that he resides in New York City solely for the purpose of attending a specialized day school there and that he therefore remains the educational responsibility of the town of Westerly. The School Department notes, however, that under prior rulings of the Commissioner, such living arrangements would in fact make him a school resident

⁴ The parties have since filed a stipulation dismissing the pending request for a due process hearing without prejudice because it was anticipated that the Commissioner's decision in this matter would not be available until after the due date for the decision required of the due process hearing officer. Student Doe also recently was re-evaluated and the results of his testing were not yet available for consideration in the due process proceeding. The parties have agreed that Student Doe's parents will re-file their request for a due process hearing subsequent to the Commissioner's ruling on residency.

of New York City. Precedent that a child cannot become a resident of a school district when he resides there solely for the purpose of attending the district's schools applies only when the child is not living with one of his or her parents. When a parent moves with the child, school residency is established. Counsel for Westerly notes that parents often relocate to a new district based on the reputation of its schools, i.e. for the primary purpose of school attendance. Such a move clearly establishes school residency in the new district. The fact that Student Doe's mother is living in New York City with him makes him a school resident of that city.

Finally, the district acknowledges that there is some precedent in special education cases in which a child who moves out of district solely to attend an appropriate day school (whether accompanied by a parent or a caretaker) remains the educational responsibility of his or her original district. However, counsel argues that the facts of this case are distinguishable. In the case at hand, Student Doe's parents actually own a residence in New York City and Student Doe's living there with his mother thereby confers educational responsibility on the new district. Furthermore, case precedent that does exist on this point is in the Ninth Circuit and is therefore not binding in Rhode Island.

For the foregoing reasons, the Westerly School Department requests that Student Doe be declared a resident of New York for school purposes.

Student Doe's Parents:

Counsel for Student Doe's parents focuses on the central fact that were it not necessary for him to live in New York City to enroll in a day school that meets his educational needs, he and his mother would be living full time at the family's Westerly home. The only reason that this student lives in the family's studio apartment in New York during most of the days of the school year is because this living arrangement enables him to attend a special education day program that would otherwise be inaccessible to him. There was no appropriate specialized day school within commuting distance of their home in Westerly (that would accept him). Enrollment in other day schools would have required that he and his mother rent living quarters and incur additional expense for which they would ultimately be seeking reimbursement from the Westerly School Department. By enrolling Student Doe in a program at a specialized day school in Brooklyn, New York, the family was able to avoid incurring additional expense and could take advantage of the fortuitous fact that they had a place to live within commuting distance of the school. Counsel submits that attendance at this private day school in New York is the functional equivalent of a residential placement for special education purposes.

Residency for school purposes remains with the town of Westerly. Counsel notes that Student Doe and his mother return to Westerly for many two-day weekends, most three-day weekends and for all school vacations, including the entire summer. Student Doe's father continues to live at the family home and works from an office in Westerly. The family's ties to Westerly extend back even to before 1984 when they built their home there. Both parents continue to vote in Westerly and file income tax returns listing their residence as Westerly, Rhode Island. Before there was a need to locate an alternative educational placement for Student Doe, he had attended public school in Westerly since pre-school and received special education and related services there through grade five. Prior to enrolling their son in the private school program in

September of 2008 the family had used the studio apartment in New York City only for cultural activities even though they had owned it since the late 1970's. Their residence has not changed because their son's special education needs require him and his mother to utilize the apartment now in order to access an educational program in New York.

Additionally, there is precedent in special education cases that a child's residence for school purposes does not change when he or she takes up temporary residence outside of the district, with a parent or another caretaker, solely for the purpose of attending an appropriate day school. Both federal and state courts have found that when a child is living under such circumstances, the child remains a resident of the original municipality in which he or she lived full-time before the placement. Counsel for Student Doe's parents provides citations to authority, including a 2000 Rhode Island Commissioner's decision⁵ that establish that a child who moves out of district solely to access a suitable special education placement and takes up residence there with a relative retains school residency where he or she originally lived.

In light of the fact that Student Doe and his mother are temporarily living in New York City during the school year and reside there only so that he can attend a specialized school to meet his needs as a student with a disability, Student Doe continues to be a resident of Westerly for school purposes. Westerly has failed to meet its burden of proving that school residency has changed under R.I.G.L. 16-64-3 and the weight of legal authority supports the conclusion that he remains a Westerly resident. The Commissioner's finding that Westerly continues to be Student Doe's residence for school purposes will affirm the preliminary finding on school residency made by the due process hearing officer on May 17, 2010. It will also enable his parents to proceed to access their rights to a due process hearing provided to them under the Individuals with Disabilities Act, 20 USC § 1400 et seq.

DECISION

Based on the facts present in this case and the administrative precedent established by the Commissioner's decision in Residency of Emily R.⁶ we find that Student Doe continues to be a resident of Westerly, Rhode Island for school purposes. He is temporarily living in New York City with his mother so that he can attend a specialized day school in which his parents unilaterally enrolled him in September of 2008. It is his parents' position (which they plan to advance at a due process hearing) that he lives in New York City and attends private school there so that he can receive an appropriate education that they contend the Westerly School Department failed to provide. The family home, where Student Doe and his mother live when he is not in school and where his father continues to reside, is located in Westerly. Under these circumstances, Westerly

⁵See Residency of Emily R., decision of the Commissioner dated April 5, 2000. In Emily R., the hearing officer stayed his final determination of residency until a local level hearing officer could make a finding as to whether or not Cranston had provided the student with a free appropriate public education. There was a factual dispute in the case as to whether the student had been sent to live with a relative because her mother's serious health problems no longer permitted her to care for her. The hearing officer believed that the local level hearing officer's finding on whether the student had been provided with FAPE would assist him in making a correct finding on residency.

⁶ With the acknowledgement that the Commissioner stayed his **final** residency determination in that case until a due process hearing officer could determine the FAPE issues. There is no record of a final Commissioner's determination of residency for Emily R.

retains educational responsibility for Student Doe. The contention that the district failed to provide him with a free appropriate public education, thereby justifying his parents' decision to make a unilateral special education placement, is a matter that will be decided by a due process hearing officer selected by the Rhode Island Department of Elementary and Secondary Education. The Westerly School Department will respond to substantiate its ongoing provision of special education and related services to Student Doe.

The cases from the Ninth Circuit⁷ as well as the more recent decision of the Massachusetts' Bureau of Special Education Appeals⁸ that have been cited by counsel for Student Doe's parents provide additional guidance on this issue.

For the foregoing reasons, Student Doe is determined to be a resident of the Town of Westerly for school purposes.

For the Commissioner,

Kathleen S. Murray

Deborah A. Gist

August 25, 2010

Date

⁷ Union School District v. B. Smith, 15 F 3d 1519, 20 IDELR 987 (9th Cir. 1994); Ojai Unified School District v. Jackson, 4 F. 3d 1467 (9th Cir. 1993).

⁸ In re Anne & Provincetown Public Schools, BSEA #04-3100 & 05-0340 (2004).